

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

CITY OF SHORELINE AND RONALD
WASTEWATER DISTRICT,

Petitioners,

and

KING COUNTY,

Intervenor,

v.

SNOHOMISH COUNTY,

Respondent,

and

OLYMPIC VIEW WATER AND SEWER
DISTRICT AND TOWN OF WOODWAY,

Intervenors.

CASE No. 16-3-0004c

**ORDER FINDING CONTINUING NON-
COMPLIANCE**

I. INTRODUCTION

On January 25, 2017, the Board issued its Final Decision and Order (FDO). The Board ruled that Snohomish County's action in adopting Amended Motion 16-135 constituted a *de facto* amendment to the Snohomish County Comprehensive Plan and created an internal inconsistency between Snohomish County's 2015 Capital Facilities Plan and (1) functional sewer plans incorporated in Snohomish County's 2015 Capital Facilities Plan and (2) General Plan Policy UT 1.B.2 in violation of RCW 36.70A.070. Further, adoption of Amended Motion 16-135 was not guided by the public participation goal of RCW 36.70A.020(11) and did not comply with the GMA public process requirements of RCW

1 36.70A.070 Preamble, RCW 36.70A.140, RCW 36.70A.035, or the concurrent annual
2 amendment requirements of RCW 36.70A.130(2). The action was remanded to the County.

3 Subsequently, Snohomish County (County) filed its Statement of Actions Taken to
4 Comply, providing a copy of Amended Motion 17-250. The County also filed the
5 compliance index. In reviewing the County's actions taken for compliance, the Board had
6 before it:
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- 8 • Amended Motion 17-250, approved July 24, 2017;
- 9 • Snohomish County's Statement of Actions Taken to Comply (County's Statement)
- 10 with exhibits, filed on August 8, 2017;
- 11 • The City of Shoreline's Objections to a Finding of Compliance (Petitioners'
- 12 Objection) with exhibits, filed on August 22, 2017;
- 13 • Ronald Wastewater District's Objections to a Finding of Compliance, filed on
- 14 August 23, 2017, which incorporates by reference the arguments submitted by the
- 15 City of Shoreline;
- 16 • Snohomish County's Response to Objections to Compliance (County's
- 17 Response), filed on August 30, 2017.
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20 Pursuant to RCW 36.70A.330(1) and (2), the Board conducted a telephonic
21 compliance hearing on September 12, 2017. Board members William Roehl and Deb Eddy
22 attended the hearing. Cheryl Pflug convened the hearing as the Presiding Officer. The City
23 of Shoreline (Shoreline) was represented by Julie Ainsworth-Taylor and Margaret King.
24 Duncan Greene appeared on behalf of Ronald Wastewater District (Ronald). Verna
25 Bromley appeared for King County. Snohomish County was represented by Brian Dorsey
26 and Jessica Kraft-Klehm. Tom Fitzpatrick appeared on behalf of Intervenor Olympic View
27 Water and Sewer District (Olympic View) and Megan Fraser represented Intervenor Town of
28 Woodway (Woodway).
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II. STANDARD OF REVIEW

After the Board has entered a finding of noncompliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.¹ After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.² For purposes of Board review of the comprehensive plans and development regulations adopted by local governments in response to a non-compliance finding, the presumption of validity applies and the burden is on the challenger to establish that the new adoption is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the GMA.³

In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made."⁴ Within the framework of state goals and requirements, the Board must grant deference to local governments in how they plan for growth.⁵ Thus, during compliance proceedings the burden remains on the Petitioners to overcome the presumption of validity and demonstrate that **any action** taken by the County is clearly erroneous in light of the goals and requirements of chapter 36.70A RCW.⁶

III. DISCUSSION

The Remanded Issues

The Board found that Amended Motion 16-135:

- Was a *de facto* amendment to the Snohomish County Comprehensive Plan.
- Created an internal inconsistency between functional sewer plans incorporated in Snohomish County's 2015 Capital Facilities Plan.
- Created an internal inconsistency between Snohomish County's 2015 Capital Facilities Plan and General Plan Policy UT 1.B.2.

¹ RCW 36.70A.300(3)(b).

² RCW 36.70A.330(1) and (2).

³ RCW 36.70A.320(1), (2), and (3).

⁴ *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

⁵ RCW 36.70A.3201.

⁶ RCW 36.70A.320(2).

- Did not comply with the requirement of RCW 36.70A.070 that comprehensive plans be internally consistent.
- Did not comply with the mandate of RCW 36.70A.130(2) that comprehensive plan amendments be considered concurrently and not more often than once per year.
- Was not guided by the public participation goal of RCW 36.70A.020(11) and did not comply with the GMA public process requirements of RCW 36.70A.070 Preamble, RCW 36.70A.140, RCW 36.70A.035, or the concurrent annual amendment requirements of RCW 36.70A.130(2).

Relevant portions of Amended Motion 16-135 were remanded to the County for action to bring it into compliance with the goal of RCW 36.70A.020(11) and the requirements of RCW 36.70A.070 (Preamble), RCW 36.70A.070(3) and (4), RCW 36.70A.140, and RCW 36.70A.035.

The County's Compliance Action

On July 24, 2017, the County approved Amended Motion No. 17-250, suspending Amended Motion No. 16-135. Amended Motion 17-250 reads, in pertinent part:

- A. The County Council **hereby suspends Amended Motion No. 16-135** approving Olympic View Water and Sewer District's Comprehensive Sewer Plan Amendment No. 2 dated June 2015 prepared by PACE Engineers Inc., to the extent of those provisions within said amendment which plan for the provision of sewer service to those areas in which sewer service is planned to be made available under the 2010 Ronald Comprehensive Sewer Plan; Provided, however, nothing contained herein shall be construed to limit or impair the right of the Town of Woodway to review and approve any such comprehensive sewer plans as may affect the provision of sewer service within said municipality in accordance with Ch. 57 RCW.
- B. In the event a final decree of a court of law should declare that the territorial boundaries/jurisdiction of Ronald do not encompass the Point Wells area within Snohomish County so as to render that portion of the 2010 Ronald Comprehensive Sewer Plan invalid or ineffective; and/or **in the event Ronald shall be dissolved or** its operations and facilities **assumed** in such a manner as to materially impair the ability of Ronald to provide sewer service to those portions of unincorporated Snohomish County consistent with the approved 2010 Ronald Comprehensive Sewer

1 Plan, **Olympic View shall be entitled to renew its request under RCW**
2 **57.16.010** for approval of those portions of Amendment No.2 which seek to
3 plan for the provision of sewer service within the Point Wells area
4 encompassed within the current 2010 Ronald Comprehensive Sewer Plan.
5 **To the extent such amendment is deemed to conflict with any then**
6 **existing effective comprehensive sewer plan of Ronald such**
7 **proposed amendment shall be docketed and processed as an**
8 **amendment to the County's GMA Comprehensive Plan in accordance**
9 **with Ch. 36.70A RCW.⁷**

10 Board Analysis

11 If the Board finds non-compliance, its remedy is to remand the matter back to the
12 jurisdiction to take legislative action to comply with the GMA or SMA.⁸ The Board does not
13 dictate what specific action must be taken. A jurisdiction could, for example, cure a failure
14 to comply with consistency and public process requirements by conducting a compliant
15 public process and adopting amendments that cure the inconsistency. Another option that
16 has led the Board to find a jurisdiction cured non-compliance has been the repeal of the
17 non-compliant action, either in its entirety or the relevant portions thereof.

18 Here, the County has taken none of these approaches, instead choosing to
19 "suspend" the non-compliant action unless and until the future occurrence of a condition that
20 allows Amended Motion 16-135 to spring back into effect.⁹ Per Amended Motion 17-250, at
21 Olympic Views' request, Amended Motion 16-135 would be reinstated subject to the
22 following: (1) a final judicial decree that the territorial boundaries/jurisdiction of Ronald do
23 not encompass the Point Wells area within Snohomish County; or (2) Ronald is dissolved or
24 its operations and facilities assumed such that Ronald's ability¹⁰ to provide sewer service in
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26 ⁷ Amended Motion 17-250 (July 24, 2017) at 3. Emphasis added.

27 ⁸ RCW 36.70A.300(3)(b).

28 ⁹ Amended Motion 17-250 at 3 provides, in pertinent part:

29 Olympic View shall be entitled to renew its request under RCW 57.16.010 for approval of those
30 portions of Amendment No.2 which seek to plan for the provision of sewer service within the
31 Point Wells area encompassed within the current 2010 Ronald Comprehensive Sewer Plan.

32 ¹⁰ Amended Motion 17-250 does not appear to allow for an entity that assumes Ronald to continue to serve
Point Wells. This is reminiscent of Woodway's insistence at the Hearing on the Merits that Point Wells will be
without a sewer provider if Ronald "goes out of business" by way of being assumed, yet RCW 35.13A.050
provides that, upon assumption of a wastewater district, the assuming city "shall for the economically useful
life of any [facilities designed to serve territory of the former district lying outside the city] make available
sufficient capacity therein to serve the sewage or water requirements of such territory," FDO at 8-9, fn. 46.

1 unincorporated Snohomish County consistent with the approved 2010 Ronald
2 Comprehensive Sewer Plan (CSP)¹¹ is materially impaired.¹²

3 The County argues that “to suspend” means “to withdraw” and, therefore, adoption of
4 Amended Motion 17-250 withdrew Amended Motion 16-135 and removed the basis for the
5 Board’s finding of non-compliance.¹³ Petitioners respond that a suspension is temporary
6 and amounts to the County granting itself a “stay” of the Board’s finding of noncompliance¹⁴
7 without complying with any of the procedural requirements to achieve such a stay, through
8 the Administrative Procedures Act in RCW 34.05.467,¹⁵ the Board’s rules in WAC 242-03-
9 860¹⁶ or petitioning the Snohomish County Superior Court.¹⁷

11 The Board agrees with Petitioners. The County’s own response quotes Webster as
12 defining “suspend” as meaning “to withdraw *temporarily*...”.¹⁸ Black’s Law Dictionary
13 defines “suspend” as “[t]o interrupt; to cause to cease for a time; to stay, delay, or hinder; to
14 discontinue temporarily, but with an expectation or purpose of resumption.
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23 ¹¹ At the compliance hearing, Ronald argued that Ronald’s adoption of a new CSP in 2017 or beyond might
24 also be considered a condition that would cause Amended Motion 16-135 to be reinstated. The Board declines
25 to address that assertion as it is not essential to the determination of compliance.

26 ¹² Amended Motion 17-250 (July 24, 2017) at 3.

27 ¹³ County’s Response at 2.

28 ¹⁴ Petitioners’ Objection at 8-9.

29 ¹⁵ RCW 34.05.467 Stay reads, in pertinent part:

30 A party may submit ... a petition for stay of effectiveness of a final order within ten days of its
31 service Disposition of the petition for stay shall be made by the presiding officer, reviewing
32 officer, or agency head as provided by agency rule.

¹⁶ Pursuant to WAC 242-03-860, the presiding officer *may* stay the effectiveness of a final order “upon motion”
if an appeal is pending “which may render ... compliance efforts futile or unduly burdensome,” provided the
stay will not prejudice the interest of other parties or substantially interfere with the goals of the GMA *and* the
stay furthers the orderly administration of justice.

¹⁷ Olympic View appealed the Growth Board’s FDO in this case in February 2017. RCW 34.05.550(2) provides
that a party may file a motion with the reviewing court for a stay of an administrative decision while an appeal
is pending.

¹⁸ County’s Response at 6. Emphasis added.

1 Amended Motion 17-250 purports to suspend Amended Motion 16-135 for an
2 indeterminate period of time – possibly indefinitely, but possibly not if the conditions set out
3 in Section B of Amended Motion 17-250 come to pass. Amended Motion 16-135 is not
4 repealed or invalidated and the Olympic View Water and Sewer District Comprehensive
5 Sewer Plan (Olympic CSP) upon which the County relies to meet GMA requirements
6 continues to include Amendment 2, which Amended Motion 16-135 approved. Thus the
7 Olympic CSP remains part of the County’s comprehensive plan in a form, allegedly
8 inoperative, that the Board found amended the County comprehensive plan *de facto*.
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10 Further, while legal avenues existed for the County to petition for a stay of the
11 Board’s final order, the County’s decision to temporarily stay Amended Motion 16-135 is
12 ineffective to stay the Board’s Order that the County take action to come into compliance
13 with the GMA.
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15 Inconsistency

16 The County urges that Amended Motion 17-250 “makes it clear that the *suspension*
17 *of Amended Motion No. 16-135 shall continue* in effect until, and *unless, there is no further*
18 *inconsistency* between the effective sewer plans of Olympic View and Ronald...”¹⁹ The
19 County urges that Amended Motion 17-250 should be interpreted to mean that the criteria
20 for determining that the inconsistency has been resolved is either (1) a court decree, or (2)
21 Shoreline’s assumption of Ronald “in a manner which materially impairs or renders
22 ineffective Ronald’s approved sewer plan for the Point Wells area.”²⁰ The County did not
23 explain in its briefs or at the Hearing on the Merits by whom or how a determination would
24 be made that Ronald had been assumed “in a manner which materially impairs” Ronald’s
25 sewer plan for Point Wells.
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¹⁹ County’s Statement at 3. Emphasis added.

²⁰ County’s Statement at 5.

1 Regardless, as noted above, Amended Motion 16-135 is not repealed or invalidated.
2 The Olympic CSP, upon which the County relies to meet GMA requirements, continues to
3 include Amendment 2.²¹ Thus the Board concluded that Amended Motion 16-135 resulted
4 in internal inconsistencies between functional sewer plans incorporated in Snohomish
5 County's 2015 Capital Facilities Plan in violation of RCW 36.70A.070.²² Additionally,
6 Amended Motion 16-135 created an inconsistency between the County's Capital Facilities
7 Plan and General Plan Policy UT 1.B.2 in violation of RCW 36.70A.070.
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9 The County's compliance action, adoption of Amended Motion 17-250, did nothing to
10 resolve the inconsistencies. It amounts to little more than a promise that the County won't
11 act on the inconsistencies in its planning documents until a court, or, significantly, the
12 County itself, decides the documents are consistent. **The Board finds** that inconsistencies
13 between functional sewer plans incorporated in Snohomish County's 2015 Capital Facilities
14 Plan, and inconsistency between the County's Capital Facilities Plan and its General Plan
15 Policy UT 1.B.2 persist in continuing violation of RCW 36.70A.070.
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17 Public process
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19 Petitioners argue that the County has not addressed its failure to comply with GMA
20 public process requirements because it has still not completed a GMA-compliant public
21 process as set forth in Snohomish County Code (SCC) Chapter 30.73 with regard to
22 Amended Motion 16-135.²³ In response, the County does not assert that it has complied
23 with GMA public process requirements. Rather, the County asserts that it was not required
24 to do so in order to suspend Amended Motion 16-135 because the suspension did not
25 amend its Comprehensive Plan.²⁴ Citing GMHB cases in which jurisdictions achieved
26 compliance by simply repealing a non-compliant action or removing non-compliant language
27 from their comprehensive plans and/or codes, the County asserts that "suspension" of
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31 ²¹ Amendment 2 to the Olympic View CSP, which Snohomish County approved in Motion 16-135, expanded
32 the Olympic View service area such that it became "partially coincident with the service area designated in the
 Ronald CSP on which the County also relies." FDO at 21.

²² *Id.*

²³ Petitioners' Objection at 2-5.

²⁴ County's Response at 4-5.

1 Amended Motion 16-135 similarly “removes the basis for the non-compliance.”²⁵ The
2 County is conflating the GMA public participation requirements for amending its Capital
3 Facilities Plan, as Amended Motion 16-135 did, with the exception allowed when a
4 compliance action simply repeals a non-compliant action and returns the jurisdiction to its
5 previously compliant state.

6 A GMA public participation process would be superfluous if Amended Motion 17-250
7 restored the County Capital Facilities Plan and its incorporated external functional plans to
8 the status quo prior to the adoption of Amended Motion 16-135; but, as previously noted, it
9 did not. Instead, the County urges that, should a condition occur by which Amended Motion
10 16-135 springs back to effect, Amended Motion 17-250 requires the County to docket and
11 process as an amendment to its Comprehensive Plan *at that time* “to the extent such
12 amendment is deemed to conflict with any then existing effective comprehensive plan.”²⁶
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14 The Board shares Petitioners’ concern with the silence of Amended Motion 17-250 as
15 to who will determine whether Amended Motion 16-135 continues to conflict such that GMA
16 public process requirements will be triggered.²⁷ The Board finds no authority for the
17 proposition that the County can amend its capital facilities plan and *later*, if the amendment
18 is “deemed inconsistent” at some time after it has been adopted, docket and process the
19 amendment as the GMA requires.
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21 **The Board finds** that adoption of Amended Motion 17-250 has not brought the
22 County into compliance with the GMA public process requirements of RCW 36.70A.070
23 Preamble, RCW 36.70A.140, RCW 36.70A.035, or the concurrent annual amendment
24 requirements of RCW 36.70A.130(2) with regard to Amended Motion 16-135.
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26 Conclusion

27 The Board is convinced that a mistake has been made. The County’s action is clearly
28 erroneous in light of the goals and requirements of the GMA.
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²⁵ County’s Response at 2-3.

²⁶ County’s response at 8-9.

²⁷ Petitioners’ Objection at 7, fn. 9.

The Board finds and concludes that adoption of Amended Motion 17-250 has not resolved the inconsistency between functional sewer plans incorporated in the County's Capital Facilities Plan or between its Capital Facilities Plan and General Plan Policy UT 1.B.2, and it has not brought the County into compliance with GMA public participation requirements with regard to Amended Motion 16-135.

The Board finds Snohomish County is in continuing noncompliance.

IV. ORDER

Based upon review of the January 25, 2017, Final Decision and Order, the February 24, 2017, Order on Motions for Reconsideration, the County's Statement of Actions Taken to Achieve Compliance, and Amended Motion No. 17-250, the Growth Management Act, prior Board orders and case law, having considered the arguments of the parties offered in the briefing and at the compliance hearing, and having deliberated on the matter, the Board Orders:

- Snohomish County is in continuing noncompliance with goals and requirements of RCW 36.70A.020(11), RCW 36.70A.070 (Preamble), RCW 36.70A.070(3) and (4), RCW 36.70A.140, and RCW 36.70A.035.
- Snohomish County shall take legislative action to achieve compliance according to the following schedule:

Item	Date Due
Compliance Due	February 2, 2018
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	February 16, 2018
Objections to a Finding of Compliance	March 2, 2018
Response to Objections	March 9, 2018
Telephonic Compliance Hearing 1 (800) 704-9804 and use pin code 4472777#	March 19, 2018 10:00 AM

Compliance Report/Statement of Actions Taken to Comply shall be limited to 20 pages, 25 pages for Objections to Finding of Compliance, and 5 pages for the Response to Objections.

SO ORDERED this 19th day of October, 2017.

Cheryl Pflug, Board Member

Deb Eddy, Board Member

William Roehl, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.²⁸

²⁸ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.

A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be served on the board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.